Jasmy Shahdi bin Jasmin Bok (t/a Extreme Power Enterprise) v Petron Malaysia Refining & Marketing Bhd (known as Esso Malaysia Bhd)

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO 12BNCC-32–05 OF 2015
ABU BAKAR JAIS J
28 MARCH 2016

Partnership — Liabilities of partners — Retirement of partner — Bankrupt partner breached agreement with company — Company sued existing partner for debts — Whether co-partner privy to agreement between bankrupt partner and company — Whether co-partner liable for firm's debt after retirement

The appellant was the partner of a company ('the firm') which received supplies of petroleum products and lubricants from the respondent. The appellant's only partner ('Azlee') and the respondent executed an agreement and the agreement only mentioned Azlee's name and there was no mention of the appellant's name. Azlee failed to pay the respondent but the respondent did not sue Azlee since Azlee was a bankrupt. Instead, the respondent sued the appellant at the sessions court as the respondent found the appellant's name after conducting a company search on the firm. The sessions court allowed the respondent's claim. Hence, the present appeal. The appellant argued that he could not be sued because he was no longer the partner of the firm six months prior to the execution of the agreement; and he was not privy to the agreement. The respondent contended that the agreement commenced when the appellant was still a partner of the firm.

Held, allowing the appeal:

(1) The appellant's partnership effectively ended when he informed Azlee of his wishes to exit the partnership and Azlee rightly accepted the same. It was unreasonable to bind the appellant on an agreement. The appellant could not be held liable (see paras 13 & 15).

(2) The respondent was utterly wrong and acted only out of convenience in suing the appellant and not Azlee. Azlee had issued the termination letter of the partnership to the appellant dated 15 September 2009. The letter could not be doubted to be a notice of the dissolution of the partnership (see paras 23 & 26).

(3) The appellant was not an apparent member. The respondent came to know of the appellant only after doing a company search. Since he was not apparent member, the appellant was not obligated to give notice to

the respondent. The name in the register could be considered not to be an associate of the business if it is proven that such person was not at any material time such an associate and that he was recorded as such in such register through a bona fide mistake or without his knowledge. The appellant's name could not be considered as an associate or partner for the business as he had left the firm and ceased to be the partner of Azlee (see paras 33 & 38).

(4) The appellant could not, after leaving the partnership, be liable for the debt of the partnership arising from the respondent's claim as the respondent never had dealings with the appellant. The retirement of the appellant as a partner could not mean that he was liable for the debt of the firm as the dissolution of the partnership had set in (see paras 51 & 53).

[Bahasa Malaysia summary

Perayu adalah rakan kongsi syarikat ('firma') yang menerima bekalan barangan petroleum dan pelincir daripada responden. Satu-satunya rakan kongsi perayu ('Azlee') dan responden melaksanakan perjanjian dan perjanjian hanya menyebut nama Azlee dan tidak disebut nama perayu. Azlee gagal membayar kepada responden tetapi responden tidak menyaman Azlee memandangkan Azlee adalah seorang bankrap. Sebaliknya, responden menyaman perayu di mahkamah sesyen kerana responden menemui nama perayu selepas menjalankan carian ke atas firma. Mahkamah sesyen membenarkan tuntutan responden. Maka, rayuan ini. Perayu berhujah bahawa dia tidak boleh disaman kerana dia bukan lagi rakan kongsi firma enam bulan sebelum pelaksanaan perjanjian tersebut; dan dia tidak bukan lagi mempunyai kepentingan kepada perjanjian tersebut. Responden berhujah bahawa perjanjian bermula apabila perayu masih rakan kongi firma.

Diputuskan, membenarkan rayuan:

(1) Perkongsian perayu tamat secara efektif apabila dia memberitahu Azlee mengenai hasratnya untuk keluar daripada perkongsian tersebut dan Azlee dengan sewajarnya menerimanya. Adalah tidak munasabah untuk mengikat perayu atas perjanjian tersebut. Perayu tidak boleh dipertanggungjawabkan (lihat perenggan 13 & 15).

(2) Responden jelas salah dan bertindak hanya daripada kesenangan dalam menyaman perayu dan bukan Azlee. Azlee telah mengeluarkan surat penamatan perkongsian kepada perayu bertarikh 15 September 2009. Surat tersebut tidak boleh diragui untuk menjadi notis pembubaran perkongsian tersebut (lihat perenggan 23 & 26).

(3) Perayu bukan ahli yang nyata. Responden mengetahui mengenai perayu hanya selepas membuat carian syarikat. Memandangkan yang dia bukan ahli yang nyata, perayu tidak diwajibkan untuk memberi notis kepada responden. Nama di dalam daftar boleh dipertimbangkan bukan sebagai

rakan perniagaan jika ia dibuktikan bahawa orang sedemikian tidak pada bila-bila masa material rakan perniagaan dan bahawa dia direkodkan sedemikian di dalam daftar sedemikian melalui kesilapan suci hati atau tanpa pengetahuannya. Nama perayu tidak boleh dipertimbangkan sebagai rakan perniagaan atau rakan kongsi untuk perniagaan kerana dia telah keluar daripada firma dan berhenti daripada menjadi rakan kongsi Azlee (lihat perenggan 33 & 38).

(4) Perayu tidak boleh, selepas meninggalkan perkongsian, bertanggungjawab bagi hutang perkongsian yang berbangkit daripada tuntutan responden kerana responden tidak pernah berurusan dengan perayu. Persaraan perayu sebagai rakan kongsi tidak bermaksud yang dia bertanggungjawab bagi hutang firma kerana pembubaran perkongsian telah set in (lihat perenggan 51 & 53).]

Notes

For cases on retirement of partner, see 10(1) *Mallal's Digest* (5th Ed, 2015) paras 1137–1141.

Cases referred to

Fatimah Hiew Yen Won & Anor v Saroja a/p Palaniappan & Anor [2012] MLJU 420; [2013] 5 CLJ 522, HC (refd)
Hup Aik Tin Mining Co v Kam Hoy Trading [1969] 1 MLJ 93, FC (not consd)
Lim Hsi-Wei Marc v Orix Capital Ltd and another and another appeal [2010] 3 SLR 1189, CA (refd)
Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd [2012] 4 MLJ 149, CA (refd)
Phillips Singapore Pte Ltd v Han Jong Kwang & Anor [1989] 2 MLJ 323, HC (refd)
Shaharuddin bin Md Idros; ex parte Esso Malaysia Bhd, Re [2009] MLJU 469; [2009] 5 AMR 163, HC (refd)
Siew Inn Steamship Company; Ex Parte Ho Hong Bank, Limited (in voluntary liquidation) in the issue, Re; Tan Boon Cheo v Ho Hong Bank, Limited (in voluntary liquidation) [1934] 1 MLJ 180 (refd)
Tan Sin Moh v Lebel Ltd [1988] 2 MLJ 51, SC (distd)
Tower Cabinet Co Ltd v Ingram [1949] 1 All ER 1033 (refd)

Legislation referred to

Partnership Act 1961 ss 34(1)(c), 38, 38(1), (3), 40
Partnership Act [SG] s 36
Partnership Act 1890 [UK] ss 36(1), (3)
Registration of Business Act 1956 s 6(1)
Registration of Business Ordinance 1956 s 6(1)

New Sin Yew (Jamie Wong with him) (Bon) for the appellant.

M Vinoben (Raja Daryl & Loh) for the respondent.

Abu Bakar Jais J:

INTRODUCTION

[1] This is an appeal after full trial against the decision of the learned sessions court's judge ('the judge') who had found for the respondent in its claim against the appellant. The judge had ordered the appellant to pay RM159,721.09 with interest and cost for the respondent's claim.

[2] This judgment discusses the interpretations of certain statutory provisions of the Partnership Act 1961 ('the Act') and the Registration of Business Act 1956 ('the RBA'). The submitted effect of these statutory provisions also formed the crux of the arguments by both sides to this appeal.

MATERIAL FACTS

[3] The appellant was the partner of a business, Extreme Power Enterprise ('the firm'). The respondent had supplied petroleum products and lubricants to the firm. The basis for the respondent's suit is for these supplies to the firm and the contention that payments had not been made to the respondent for these supplies.

[4] The only other partner of the appellant, one Azlee Abdul Raof ('Azlee') and the respondent executed an agreement known as the 'Service Station Agreement' ('agreement') dated 8 March 2010. The agreement allows the firm to run the 'Esso' service station of the respondent and to be supplied the petroleum products and lubricants from the respondent.

[5] Of significance to note is the fact that the agreement does not mention nor indicate in any manner the name of the appellant but only Azlee. In essence it was Azlee who signed the agreement but not the appellant.

[6] Azlee failed to pay the respondent for the petroleum products and lubricants based on the agreement.

[7] For this failure, the respondent did not sue Azlee because he had been declared a bankrupt. The respondent instead did a company search on the firm and found the name of the appellant as a partner of Azlee. Therefore since it cannot sue Azlee, the respondent decided to train its guns on the appellant and sued him purportedly as still being the partner in the firm.

THE APPELLANT'S ARGUMENTS

[8] In gist the appellant contended he cannot be sued by the respondent as at the material time he was no longer the partner of the firm as he had resigned from the partnership. He submitted that he left the partnership and therefore the firm on 15 September 2009, about six months prior to the execution of the agreement. The appellant also argued the agreement between the firm and the respondent cannot bind the appellant as the appellant's partner then, Azlee Abdul Raof ('Azlee') signed the same on his own without the appellant's knowledge. The appellant also submitted he was not privy to the agreement.

THE RESPONDENT'S ARGUMENTS

[9] In summary the respondent contended it is not true that the appellant was no longer the partner of Azlee as although the agreement was executed on 8 March 2010, the agreement had commenced on 1 October 2009 when the appellant was the partner. The relevant documents indicate that the appellant was still the partner and therefore the right party to face the suit. Also the respondent argued there was no notice given by the appellant to the respondent informing that he had ceased to be a partner in the firm.

THE COURT'S FINDINGS

[10] The key contentions of both the appellant and the respondent as indicated above can be distilled to a few issues as narrated in the sub-headings as seen below. The reasons for the determination of these issues are also explained thereafter.

Whether the agreement binds the appellant

[11] The agreement commenced on 1 October 2009 according to the respondent although the same was executed only on 8 March 2010. The contention of the respondent here is to show that the appellant should be made liable as on 1 October 2009 the appellant was in any event the partner in the firm.

[12] The respondent submitted the firm had been appointed to run the service station since 2001. The agreement had been executed for specific periods. After the expiry of the initial periods, the agreement was extended and a new agreement would be signed. Therefore it is the contention of the respondent that the appellant is aware of the agreement executed on 8 March 2010 as the agreement had commenced on 1 October 2009.

[13] Having considered this contention of the respondent, I had examined the contention of the appellant in turn. The appellant submitted that he had informed Azlee that he wishes to exit the partnership. This must have been agreed by Azlee as it is a fact there is a letter showed at the trial to this effect send by Azlee.

[14] I find that it is unreasonable to bind the appellant on an agreement which was only signed on 8 March 2010 after the appellant left the partnership on 15 September 2009. To find the contrary would not be fair to the appellant as he was unaware of the agreement. Also by informing Azlee, who rightly accepted the same, the appellant's partnership had effectively ended.

[15] The earlier agreement may have stood for some time. But the material agreement forming the basis for the respondent's suit for non-payment of the products was executed only on 8 March 2010, after about six months the appellant left the partnership. Under the circumstance, the appellant could not be held liable since he had exited the partnership. More so when I consider the evidence of the respondent's own witness at the trial as follows;

> Q: Can you explain this relationship between the Plaintiff and the firm?
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> The firm was appointed by the Plaintiff as licensee to operate the Service Station since 2001.
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> A: When I joined the Plaintiff in July 2008, there was already an existing agreement between the Plaintiff and the Defendant for the operation of the Service Station. *Upon the natural expiration of the agreement, the Plaintiff and the Defendant entered into a new agreement. The new agreement known as the Service Station License Agreement and was dated 8.3.2010 ('the Agreement'). This Agreement forms the subject matter of this suit filed by the Plaintiff.* (Emphasis added.)

[16] Precisely because the appellant had left the partnership too, the agreement was executed by Azlee alone and not the appellant. In fact the respondent does not dispute that it was Azlee who had executed the same. The respondent's witness also testified that he had only dealt with Azlee and not the appellant. That reinforced the finding that the appellant cannot be made liable for the respondent's claim.

[17] And it was only because Azlee is now a bankrupt that the respondent was ingenious to sue the appellant instead. It is not too difficult to foresee had Azlee remained not a bankrupt, there is little doubt the respondent would not have sued the appellant but would have pursued its case against Azlee.

[18] The agreement too cannot bind the appellant because of s 40 of the Act which states:

> After the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, *so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise* ... (Emphasis added.)

[19] Applying the provision above, the agreement in the present appeal is a continuing agreement obviously not for the purpose to wind up the partnership or to complete unfinished transactions at the time of dissolution of the partnership. The provision narrated thus could not bind the appellant because the two conditions explained in the provision itself, do not apply against the appellant.

[20] The effect of s 40 of the Act was explained in *Fatimah Hiew Yen Won & Anor v Saroja a/p Palaniappan & Anor* [2012] MLJU 420; [2013] 5 CLJ 522 by Abdul Rahman Sebli J (now JCA) in the following fashion:

> The plaintiffs' argument that despite the dissolution of the partnership the firm could still carry on with business as usual is partly true. Section 40 of the Act allows for a limited business activity in such situation. It provides, inter alia, as follows:
>
> > After the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise
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> *The effect of this provision is that after the partnership is dissolved the partners can continue to transact business in the name or on behalf of the firm but only for the limited purpose of winding up the affairs of the partnership and to complete unfinished transactions, and no others*. This means upon completion of the unfinished business, no further dealing in the firm's name is permitted. This is a statutory prohibition and the partners cannot contract out of it. What is left to be done is to wind up the partnership. (Emphasis added.)

[21] Further, Azlee cannot bind the appellant with the execution of the agreement as s 40 of the Act has the effect of prohibiting the appellant from continuously be bounded except for the two reasons explained.

[22] This is illustrated in the Singapore's case of *Lim Hsi-Wei Marc v Orix Capital Ltd and another and another appeal* [2010] 3 SLR 1189 where the following observation in relation to s 36 of the Singapore Partnership Act (which is pari materia to s 38 of the Act) was made by VK Rajah JA:

A We, however, agree with the judge's alternative ground for finding that RY should not be held liable, ie because Orix was dealing with the firm on the basis of the August agreement, which was a new contract. It could not thereafter rely on s 36 to render RY liable. The present matter is easily distinguishable from cases such as *Wood v Fresher Foods Ltd* [2008] 2 NZLR 248, where the debt of the firm was B incurred after the partner retired but the distribution agreement upon which the debt was founded was concluded before the partner's retirement. *As mentioned above, the traditional rationale underlying the liability imposed under s 36 is that as a rule of the law on agency, the partner's authority continues until revoked. While the retired partner may be liable for debts accruing after his withdrawal in respect of* C *contracts entered into while he was a partner, it does not follow that the retired partner is also liable for debts arising from contracts concluded after he left the firm. This is because by retiring from the firm, the partner has terminated the authority of his fellow partners to continue concluding agreements that would bind him.*

A remaining partner in the firm (in this case LCP) can have no basis on which to make D *new agreements on the retiring partner's (in this case RY) behalf except in extenuating circumstance such as where the partner has retired but somehow knowingly continues to allow himself to be held out as being still a part of the firm (which was not the case here). Similarly, applying the estoppel analysis, by retiring from the firm, RY has ceased to hold herself out as a partner and subsequent contracts concluded on the misrepresentation that* E *she is a partner should not bind her.* Although Orix might have had prior dealings with CPP, it was suing on a fresh contract entered into after RY's retirement. Orix should not have simply assumed that the composition of CPP remained the same. In fact, it never inquired into whether CPP was still made up of the same partners as when the original agreement was entered into. As such, Orix cannot succeed F against RY on this ground. (Emphasis added.)

Whether the appellant was still the partner of Azlee

[23] At the material time as explained above, the appellant was no longer a G partner of Azlee and the partnership had dissolved. It is also in evidence (p 484 of the record of appeal) that Azlee had even issued the termination letter of the partnership to the appellant dated 15 September 2009.

[24] More than that, in this very letter, Azlee indicated he wanted to run the H firm on his own and as the sole proprietor. Azlee even explained in this letter that the respondent had recognised him as the sole proprietor and the only licensee of the respondent.

[25] Further it is appropriate to take a look at s 34(1)(c) of the Act in respect I of dissolution of partnership by notice which states:

Subject to any agreement between the partners, a partnership is dissolved:

(a) if entered into for a fixed term, by the expiration of that term;

(b) if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking; or

(c) *if entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.*

(2) In the last-mentioned case the partnership is dissolved *as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.* (Emphasis added.)

[26] That letter of termination of the partnership issued by Azlee cannot be doubted to be a notice of the dissolution of the partnership. As a consequence the provisions of the Act as narrated above apply in favour of the appellant to conclude he was no longer a partner of Azlee. Therefore the respondent was utterly wrong and acted only out of convenience in suing the appellant and not Azlee.

Whether the respondent must be given notice of the appellant's cessation as a partner

[27] The respondent contended that it had not received any notice about the appellant's termination and cessation as a partner of the firm. Therefore the appellant as submitted by the respondent would still be considered as a partner and hence cannot escape liability in respect of the respondent's claim.

[28] For this, the respondent relied on s 38(1) of the Act that states:

Where a person deals with a firm after a change in its constitution, he is entitled to treat all *apparent members* of the old firm as still being members of the firm until he has notice of the change. (Emphasis added.)

[29] The respondent also relied on s 6(1) of the RBA which states:

Save as hereinafter expressly provided, when and so long as any person is recorded in any register as an associate of a business, it shall be evidence against him or any person claiming through or under him that he was such an associate *unless it is proved that such person was not at any material time such an associate and that he was recorded as such in such register through a bona fide mistake, or without his knowledge* and in fraud of him. (Emphasis added.)

[30] In respect of the provision of RBA as narrated above, the respondent cited the Federal Court's case of *Hup Aik Tin Mining Co v Kam Hoy Trading* [1969] 1 MLJ 93. In this case the relevant provision considered which is pari materia with the above provision of the said RBA, was s 6(1) of the Registration of Business Ordinance 1956 ('the RBO'). The respondent also highlighted the following passage of the case:

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> When a known partner retires, or a partnership is dissolved, notice of that fact must be given to the world at large by advertisement and to old customers by some special communication. An old customer is entitled to a more specific notice than a person who never dealt with the firm at all.

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[31] That passage quoted was the elaboration of the court then on the effect of the provision of s 6(1) of the RBO which as explained is pari materia to s 6(1) of the RBA.

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[32] First, it must be noted that s 38(1) of the Act contains the words 'apparent members'. This provision of the Act means anyone can consider the 'apparent members' in the firm as still being a partner in the context of this case now until he or she is informed otherwise. Therefore before this provision is used, the respondent relying on the same must prove that the purported

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partner ie the appellant is an apparent member.

[33] So the question to ask, is the appellant an 'apparent member'? First how could the appellant be an apparent member as the respondent came to know of the appellant only after doing a company search since it cannot sue Azlee as he

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was a bankrupt. Only just before filing the suit did the respondent know that the appellant was a partner in the firm. Therefore the appellant all the while was not apparent in the eyes of the respondent. Thus s 38(1) of the Act does not operate for the respondent against the appellant.

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[34] Second as explained earlier, the respondent's own witness gave evidence that he had only dealt with Azlee and not the appellant. This shows that the appellant could not have been 'an apparent member'. Since he is not an apparent member, there is no obligation on the appellant to give a notice to the respondent pursuant to s 38(1) of the Act.

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[35] Further the meaning of 'apparent members' is explained in the case of *Tower Cabinet Co Ltd v Ingram* [1949] 1 All ER 1033. The term 'apparent members' in s 36(1) of the English Partnership Act 1890 (which is in pari materia with s 38(1) of the Act) was explained by Mr Justice Lynskey:

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> The point depends, in my view, on what is the meaning in sub-s (1) of 'apparent members'. Apparent to whom? Does it mean apparent to the whole world, or notorious, or does it mean apparent to the particular person with whom the section is dealing? *In my reading of that sub-section, 'apparent members' means persons who*

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> *appear to be members to the person who is dealing with the firm, and they may be apparent either by the fact that the customer has had dealings with them before, or because of the use of their names on the notepaper, or from some sign outside the door, or because the customer has had some indirect information about them.* Both sub-s (1) and sub-s (2), in my view, deal with cases where they are apparent members. (Emphasis added.)

[36] In Singapore, in the High Court's decision of *Phillips Singapore Pte Ltd v Han Jong Kwang & Anor* [1989] 2 MLJ 323 the learned Chan Sek Keong J elaborated on the word 'apparent' in s 36(1) of the UK Partnership Act 1980 to say:

> The expression 'apparent' in s 36(1) does not apparently mean apparent from any statutory record kept in accordance with legislation corresponding to the Business Registration Act but apparent in contrast to a dormant partner.

[37] Thus what is looked at is not just the register in any form of the firm to see whether any one is listed as partner of the firm but also to look at the facts whether a person is an apparent partner as opposed to a dormant partner. The distinction that applies is whether a dormant partner should be considered similarly as an apparent partner. An apparent partner is not determined just by looking at the register but also by taking note whether he is an 'active face' in the firm as opposed to a dormant partner, as one who is not at all perceived as being involved in the firm.

[38] Further, of significance to be noted is the wordings contain in both s 6(1) of the RBA and RBO as explained. The name in the register can be considered not to be an associate of the business if it is proven 'that such person was not at any material time such an associate and that he was recorded as such in such register through a bona fide mistake or without his knowledge' (see the provision). As explained earlier the appellant's name cannot be considered an associate or in this case the partner for the business as he had left the firm and ceased to be the partner of Azlee. Therefore if his name is still recorded in the register as an associate, he could seek the protection afforded by s 6(1) of the RBA as his name was recorded because of bona fide mistake or without his knowledge since he had legitimately ceased to be a partner after being notified by Azlee.

[39] In addition, with respect to the respondent, Hup Aik Tin cannot be applied in favour of the respondent here as the Federal Court then did not address itself on the provisions of the Act. The thrust of its findings then was the effect of registration of business especially s 6(1) of the RBO. The provisions of the Act were not considered at all in Hup Aik Tin. On the other hand, the case of the appellant and the respondent with regard to the appeal now, must not only take into account the statutory provision of the RBA as explained but also the Act. And in this regard as explained, s 34(1)(c) of the Act operates in favour of the appellant. Thus not only s 6(1) of the RBA should be addressed by this court, I am of the view together with that provision, I have a duty to also take note the stated provision of the Act in order to arrive at a decision which meets the justice of this case.

[40] Also as noted, for this issue the fundamental argument of the respondent is that the appellant had failed to essentially notify the respondent on his cessation as partner in the firm and partner of Azlee. However as explained, there is no duty for the appellant to give the notice that he is no longer a partner of the firm. This is because the appellant was never 'apparent' in the eyes of the respondent. The respondent at all material times had never known the appellant as the partner of the firm.

[41] It should be pointed out that the respondent is also relying on the Supreme Court's case of *Tan Sin Moh v Lebel Ltd* [1988] 2 MLJ 51, where the court held;

> The respondent was, on the evidence available, a person who had habitual dealings with the partnership and was therefore to be specifically notified of the withdrawal of the appellant from partnership, something which the latter had omitted to do ... The respondent creditor was therefore entitled under Section 6 of the Registration of Businesses Act 1956 to rely on the particulars recorded in the register kept in the Business Registry to ascertain whether the appellant remained a partner of the form at the commencement of the suit.

[42] First, that quotation above relied by the respondent clearly indicated that the parties had dealings between them. Since the parties had dealt with each other, it was said in that case the respondent was entitled to be given the notice of withdrawal of the appellant as a partner. The facts are peculiar to that case alone. In the present appeal, as explained there was no dealing between the appellant and the respondent as admitted by the witness of the respondent itself. The respondent at all material times was not aware of the appellant as a partner of Azlee in the firm. Therefore *Tan Sin Moh* must be distinguished from the facts of the present case on appeal now.

[43] Second, admittedly *Tan Sin Moh* did discussed the interpretation of the provisions of the Act especially s 38(1) of the Act on the term 'apparent members'. However in this case it was found that the facts justified the finding the relevant partner had dealings with the business to be considered an apparent member of the same. The facts thus found in this case are not similar to the facts in the present appeal. For this reason too, *Tan Sin Moh* ought to be distinguished.

[44] Another case relied by the respondent is the case of *Re Shaharuddin bin Md Idros; Ex parte Esso Malaysia Bhd* [2009] MLJU 469; [2009] 5 AMR 163, where the High Court referred to the RBA and held:

> Even where the failure to register particulars of withdrawal from a partnership is the fault of a party other than the withdrawing partner, such as the existing partners or the Registry of Businesses itself, this does not alleviate that partner's continuing liability under the partnership for so long as he remains on the register as partner;

Where a creditor has habitual dealings with business … express notice of withdrawal is to be accorded to the creditor. This was not done in the instant case;

Although Shaharuddin withdrew as a partner in November 1982 and the debt with Esso was incurred in 1984, the fact that no notice of withdrawal was accorded precludes Shaharuddin from denying liability for the debt in accordance with the law.

[45] This case too did involve the provisions of the Act that have been highlighted. However it was also found in this case as in *Tan Sin Moh* that the relevant partner had dealings with the other party claiming for the case. Therefore the facts of this case too are different and should be distinguished from the facts of the present case.

[46] The courts in the cases cited by the respondent had taken the approach that if anyone is registered in the register of business, he then should be accepted as a partner of the same unless he has given notice to anyone on the other side of the business that he is no longer the partner in that business. That seems consistent with the provisions of the RBA as narrated earlier. In fact I am of the opinion that should be the case if the RBA is taken in isolation. However the RBA must be taken for consideration with the provisions of the Act, so that when the partner is not 'apparent' in the eyes of anyone dealing with the business or more specifically the firm, there is no necessity for such notice to be given. This in turn would mean that not in all cases where one's name appears in the register, he would inevitably be considered a partner of that business. This is where the provisions of both statues, the RBA and the Act, can harmoniously be read and this indeed should be the most appropriate approach to be taken. It is an approach where one could still read the provisions of the RBA but any given situation would also need the consideration of the provisions of the Act. Of course the main consideration is to determine whether the partner concerned is an apparent member of the partnership.

[47] As a consequence, for the present appeal, I am of the opinion that no notice needs to be given by the appellant to the respondent to the effect that he is no longer a partner in the firm. The respondent cannot say the appellant is still the partner of the firm because the appellant was never an 'apparent member' of the firm to the respondent.

[48] This proposition that no notice needs to be given is further supported by the case *Re Siew Inn Steamship Company; Ex Parte Ho Hong Bank, Limited (in voluntary liquidation) in the issue; Tan Boon Cheo v Ho Hong Bank, Limited (in voluntary liquidation)* [1934] 1 MLJ 180 where Prichard J quoting from *Lindley on Partnership* (9th Ed) at p 291, said that:

When a dormant partner retires, he need give no notice of his retirement in order to free

> *himself from liability in respect of acts done after his retirement. The reason is that, as he was never known to be a partner, no one can have relied on his connection with the firm, or truly allege that, when dealing with the firm, he continued to rely on the fact that the dormant partner was still connected therewith*.
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> But when an apparent partner retires, or when a partnership between several known partners is dissolved, the case is very different; for then those who dealt with the firm before a change took place are entitled to assume that no change has occurred until they have notice to the contrary. (Emphasis added.)

[49] *Re Siew Inn Steamship Co* and the principle that s 38(1) of the Act only requires 'apparent members' to give notice while 'dormant members' need not do so was affirmed by the Singapore's apex court in *Lim His-Wei Marc* where VK Rajah JA explained that:

> *It ought to be noted that dormant or silent partners would usually not appear to third parties as apparent members of the firm* ...
>
> In other words, creditors who have had dealings with the partnership are entitled to actual notice of the reconstitution of the firm, those who have had no previous dealings with the firm but who were aware of the firm's reputation (*in that they had known of the apparent partners*) would be entitled to notice via an appropriate announcement in the Singapore Gazette or a similar publication ... (Emphasis added.)

Whether the appellant is liable for the firm's debt after his retirement

[50] Section 38(3) of the Act states:

> The estate of a partner who dies or who becomes bankrupt, or *of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after* the date of the death, bankruptcy, or *retirement* respectively. (Emphasis added.)

[51] The above provision has the effect that a partner who is not known in the partnership by any person dealing with the firm, cannot be liable for the debt incurred by the partnership after the retirement of the said partner. Likewise the appellant in the present appeal, after leaving the partnership, cannot be liable for the debt of the partnership arising from the respondent's claim as the respondent never had dealing with the appellant at all material times.

[52] This was precisely the case in *Tower Cabinet Co Ltd*, where Lynskey J in interpreting s 36(3) of the UK Partnership Act 1890 (pari material with s 38(3) of the Act) stated that:

> Sub-section (3) again deals with the particular individual. It does not deal with the public at large. Its words are, to my mind, simple and obvious. It does not deal

merely with questions of apparent members or non-apparent members. *It applies the test: '... a partner who, not having been known to the person dealing with the firm to be a partner ...' Whether he was to other people an apparent partner, or whether he was a dormant partner, the words seem to me to be equally applicable. If the person dealing with the firm did not know that the particular partner was a partner, and if that partner retired, then, as from the date of his retirement, he ceases to be liable for further debts contracted by the firm with that person.* The fact that later the person dealing with the firm may discover he was a partner seems to me to be irrelevant, because the date from which the sub-section operates is the date of the dissolution. *If the person who subsequently deals with the firm had no knowledge prior to the dissolution that the retiring partner was a partner, then sub-s (3) comes into operation, and, in effect, relieves the person retiring from liability*. (Emphasis added.)

[53] What was said above by Lynskey J are on all fours consistent with the facts of the present appeal where the respondent only knew of the appellant as a partner of the firm when the former was about to file the suit. This is only after the respondent made the company search. It shows that prior to this, there was no dealing between the respondent and the appellant. Thus the retirement of the appellant as a partner, cannot mean that he is liable for the debt of the firm as the dissolution of the partnership has set in.

THE LEARNED JUDGE'S JUDGMENT

[54] Perusing the grounds of judgment of the learned judge, with respect she had failed to take into account whether the appellant was an apparent member of the firm. There is with respect, no evaluation of the evidence that the respondent only knew of the appellant when a company search was made just before the respondent filed the suit against the appellant. There is no appreciation by the learned judge that the respondent had taken action against the appellant only after this company search as the other partner of the appellant, Azlee is a bankrupt. There is also no acknowledgement of the fact that the respondent's own witness had testified he did not deal with the appellant at all material times. Had the learned judge evaluated these evidences, she would have appreciated that the appellant is not an apparent member pursuant to s 38(1) of the Act. As the appellant is not an apparent member, the learned judge should have found that there is no necessity for the appellant to notify the respondent regarding his cessation as a partner of Azlee.

[55] As the learned judge had not addressed her mind on these evidences, there is justifiable reasons that her findings be disturbed. The failure to appreciate the factual matrix of the case and also the law as reflected by s 38(1) of the Act and other provisions of the same, as discussed, would mean that the learned judge findings cannot be defended. As stated by the Court of Appeal in *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149, when there was insufficient judicial appreciation by the trial judge of the

A evidence placed before the court, an appellate court will intervene to rectify that error so that injustice is not occasioned.

CONCLUSION

B **[56]** The agreement cannot bind the appellant who had terminated his partnership prior to the agreement being executed. The statutory provision of the Act too as explained, would mean the agreement has a limited scope in its application against the appellant as reflected by s 40 of the Act.

C **[57]** The appellant too cannot be considered as still being the partner of Azlee. Sufficient notice of the termination was given to indicate that the appellant was no longer the partner in the firm.

D **[58]** There is also no obligation on the part of the appellant to notify the respondent with regard to the former cessation as a partner in the firm. As the appellant was not an apparent member of the firm at all material times, there is no requirement imposed on the appellant to give any notice to the respondent regarding this cessation as a partner.

E **[59]** The appellant also cannot be liable for the debt of the firm after he left the firm as a partner. The facts of the present case indicates s 38(3) of the Act applies in favour of the appellant to absolve him from the liability of any debt of the firm after his departure from the same.

F **[60]** The failure of the learned judge especially to appreciate the fact that the appellant is not an apparent member in the partnership in the eyes of the respondent, means the learned judge's judgment can be set aside. There has been a failure of judicial appreciation of the relevant evidences by the learned G judge so as to allow appellate intervention to correct the error.

[61] The appeal is therefore accordingly allowed for the appellant with cost.

Appeal allowed.

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Reported by Afiq Mohamad

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